**Pace Oldsmobile, Inc. and Amalgamated Local Union 355.** Cases 2-CA-16958 and 2-CA-17107

July 1, 1981

## DECISION AND ORDER

On January 26, 1981, Administrative Law Judge Raymond P. Green issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief, and the General Counsel filed an answering brief. The General Counsel filed limited exceptions and a brief in support thereof.

The National Labor Relations Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings,[1] and conclusions[2] of the Administrative Law Judge, as modified herein, to modify his remedy,[3] but not to adopt his recommended Order.[4]

The General Counsel has excepted to the Administrative Law Judge's failure to find that Respondent violated Section 8(a)(1) of the Act by telling employee Kenneth Barrett that the Union would not provide insurance or other benefits while Respondent would pay full insurance costs as of the first of the year and could offer him participation in a profit-sharing plan. The record reveals that on or about December 10, 1979, Barrett was finishing up some work in the parts department after closing time when the manager of that department, Joseph A. Montenaro, approached him and said, "I need to talk to you for a minute." Barrett and Montenaro went into the Honda showroom behind the parts department and sat down. Montenaro said, "I know everything that's going on in the building, I know the union's coming in. Richie Tognetti told me everything." Montenaro asked Barrett if he was involved with the Union, had gone to any meetings, or had signed a card. Barrett indicated that he had not gone to any meetings, but that he would go and hear what they had to say. Montenaro replied "[T]hat's your right, you should go. But, let me tell you, the union will just take your dues, they'll screw over you [sic], they won't pay your maternity or insurance like they say they will." Montenaro then proceeded, in Barrett's words, "to tell me what [Respondent] could do for me. He said after the first of the year, we'll be picking up 100 percent of your insurance. He explained the profit sharing program to me, and a few other small items."

We agree with the General Counsel that Respondent violated Section 8(a)(1) of the Act by promising to provide Barrett with insurance fully funded by Respondent. However, we do not agree that Respondent's reference to its profit-sharing plan also violated Section 8(a)(1) inasmuch as the plan was in existence prior to the advent of the union activities, and Barrett was offered no special concession not available to other employees.[5]

### AMENDED CONCLUSIONS OF LAW

Delete Conclusion of Law 7 and substitute the following:

"7. By threatening to discharge employees who support the Union, and by threatening to close its facility and to cause the loss of pension and profit sharing benefits if the Union were selected as the collective-bargaining representative of its employees, Respondent violated Section 8(a)(1) of the Act."

[1] Respondent has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

[2] In sec. VI,C, par. 2, of his Decision, the Administrative Law Judge found that Respondent violated the Act by threatening employees with the loss of existing benefits if they chose the Union to represent them. However, he inadvertently failed to reflect his findings that Respondent Service Manager Marini and Montenaro threatened employees Neubauer and Rosenfeld, respectively, that they would lose pension and profit-sharing benefits if they chose the Union to represent them. Conclusion of Law 7 will be amended accordingly.

[3] We have modified the Administrative Law Judge's remedy to include *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962), for the rationale on interest payments which he inadvertently omitted.

[4] In par. 2(b) of his recommended Order, the Administrative Law Judge provided that Respondent is required to dismiss any person hired to replace Robert Kennedy after January 3, 1980. The record shows and we find that Kennedy was unlawfully laid off on November 28, 1979. Accordingly, we agree with the General Counsel's exception and find that Respondent is obligated to reinstate Kennedy, dismissing, if necessary, any replacement hired for Kennedy from that date.

In par. 1(g) of his recommended Order, the Administrative Law Judge provided that Respondent shall cease and desist from "in any like or related manner" infringing upon employee rights guaranteed in Sec. 7 of the Act. However, we have considered this case in light of the standards set forth in *Hickmott Foods, Inc.*, 242 NLRB 1357 (1979), and have concluded that a broad remedial order is appropriate inasmuch as Respondent has been shown to have engaged in egregious misconduct demonstrating a general disregard for the employees' fundamental statutory rights.

In light of the foregoing, and to correct certain other minor errors in the Administrative Law Judge's recommended Order, we will issue an Order in lieu of that of the Administrative Law Judge.

[5] We recognize that the complaint does not specifically allege that Respondent, through its agent, Montenaro, violated Sec. 8(a)(1) of the Act by promising benefits to Barrett. However, it does allege that Respondent violated the Act by other statements made during this same conversation. We therefore find that Montenaro's remarks are "sufficiently related to the subject matter of the complaint to justify a specific finding of a violation of Section 8(a)(1) of the Act." *Alexander Dawson, Inc., d/b/a Alexander's Restaurant and Lounge*, 228 NLRB 165 (1977), enfd. 586 F.2d 1300 (9th Cir. 1978). Respondent had every opportunity to litigate the unlawfulness of Montenaro's remarks and fully availed itself of that opportunity. Both Barrett and Montenaro were examined and cross-examined extensively concerning the details of this December 10 conversation. See *Gerald G. Gogin d/b/a Gogin Trucking*, 229 NLRB 529, fn. 2 (1977), enfd. 575 F.2d 596 (7th Cir. 1978).

## ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, Pace Oldsmobile, Inc., New Rochelle, New York, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Laying off employees because of their membership in or activities on behalf of the Union or any other labor organization.

(b) Promising or granting increased benefits such as medical insurance, increased overtime, or early entry into the pension and profit-sharing plan to induce employees to withhold their support for the Union.

(c) Threatening to discharge employees who support the Union, and threatening to close its facility and to cause the loss of pension and profit-sharing benefits if the Union is selected as the collective-bargaining representative of its employees.

(d) Interrogating employees regarding their membership in or support for the Union.

(e) Refusing to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with Amalgamated Local Union 355, as the exclusive bargaining representative of its employees in the following appropriate unit:

> All full-time and regular part-time service employees employed by Respondent at its facility located at 25 Main Street, New Rochelle, New York, exclusive of all office clerical employees, salesmen, guards and supervisors as defined in Section 2(11) of the Act.

(f) Unilaterally granting to its employees the benefit of assuming the full cost of increased insurance coverage without first notifying the Union and bargaining collectively with it in good faith concerning such a proposed change, provided that nothing herein shall require Respondent to rescind any increased benefit which it has previously granted.

(g) In any other manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action which the Board finds willeffectuate the policies of Act:

(a) Offer Robert Kennedy, Eugene Rosenfeld, and Frank DiPasquale immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed, dismissing if necessary any employees hired as replacements for them.

(b) Make whole Robert Kennedy, Kenneth Barrett, Richard Neubauer, Eugene Rosenfeld, and Frank DiPasquale for any loss of earnings they may have suffered by reason of the discrimination against them in the manner set forth in the section of this Decision entitled "The Remedy."

(c) Upon request, bargain with the Union as the exclusive representative of all employees in the aforesaid appropriate unit with respect to rates of pay, wages, hours, and other terms and conditions of employment, and if an understanding is reached, embody such understanding in a signed agreement.

(d) Preserve and, upon request, make available to the Board or its agents, for examination and, copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(e) Post at its facility at 25 Main Street, New Rochelle, New York, copies of the attached notice marked "Appendix."[6] Copies of said notice, on forms provided by the Regional Director for Region 2, after being duly signed by Respondent's authorized representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(f) Notify the Regional Director for Region 2, in writing, within 20 days from the date of this Order, what steps the Respondent has taken to comply herewith.

IT IS FURTHER ORDERED that the complaint be dismissed insofar as it alleges violations not specifically found herein.

[6] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

## APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The Act gives employees the following rights:

To engage in self-organization
To form, join, or assist any union

To bargain collectively through representatives of their own choice

To engage in activities together for the purpose of collective bargaining or other mutual aid or protection

To refrain from the exercise of any or all such activities.

WE WILL NOT lay off employees because of their membership in or activities on behalf of Amalgamated Local Union 355, or any other labor organization.

WE WILL NOT promise or grant increased benefits such as medical insurance, increased overtime, or early entry into our pension and profit-sharing plan to induce our employees to withhold their support for the Union.

WE WILL NOT threaten to discharge employees who support the Union, or threaten to close our facility or to cause the loss of the pension and profit-sharing benefits if the Union is selected as the collective-bargaining representative of our employees.

WE WILL NOT interrogate our employees regarding their membership in or support for the Union.

WE WILL NOT refuse to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with Amalgamated Local Union 355, as the exclusive bargaining representative of our employees in the following appropriate unit:

All full time and regular part time service employees employed by us at our facility located at 25 Main Street, New Rochelle, New York, exclusive of all office clerical employees, salesmen, guards and supervisors as defined in Section 2(11) of the Act.

WE WILL NOT unilaterally grant to our employees the benefit of assuming the full cost of increased insurance coverage without first notifying the Union and bargaining collectively with it, in good faith, concerning such a proposed change, provided that nothing herein shall require us to rescind any increased benefits which we have previously granted.

WE WILL NOT in any other manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL offer to Robert Kennedy, Eugene Rosenfeld, and Frank DiPasquale, immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges previously enjoyed, dismissing if necessary any employees hired as replacements for them.

WE WILL offer to Robert Kennedy, Kenneth Barrett, Richard Neubauer, Eugene Rosenfeld, and Frank DiPasquale for any loss of earnings they may have suffered by reason of our discrimination against them.

WE WILL, upon request, recognize and bargain with the Union as the exclusive collective-bargaining representative of our employees in the aforesaid appropriate unit with respect to rates of pay, wages, hours, and other terms and conditions of employment, and, if an understanding is reached, embody such understanding in a signed agreement.

PACE OLDSMOBILE, INC.

## DECISION

### STATEMENT OF THE CASE

RAYMOND P. GREEN, Administrative Law Judge: These consolidated cases were heard before me in New York, New York, on July 7, 8, and 9, 1980. The charge in Case 2-CA-16958 was filed by Amalgamated Local Union 355, herein called the Union, on December 17, 1979, and the charge in Case 2-CA-1707 was filed by the Union on February 28, 1980. The Regional Director for Region 2 issued complaints and notices of hearing based on the two charges, respectively, on January 31 and March 27, 1980. Thereafter, on March 28, 1980, the two complaints were consolidated for hearing. The issues presented are:

1. Whether on or about November 28, 1979, Respondent discharged its employee, Robert Kennedy, because of his membership, activities, or support for the Union.

2. Whether on or about December 4, 1979, Respondent, by Joseph Montenaro, interrogated employees concerning their union membership, activities, and support of the Union.

3. Whether Respondent by posting a notice on December 6, illegally promised that it would assume the full cost of medical and hospital insurance for the purpose of dissuading employees from supporting the Union.

4. Whether on or about December 14 and 24, 1979, Respondent, by Alvin Berchin and Joseph Marini, respectively, promised wage increases to employees for the purpose of dissuading them from supporting the Union.

5. Whether on or about December 15, 1979, Respondent, by Joseph Marini[1] and Joseph Montenaro, threatened employees with loss of benefits, plant closure, and the loss of jobs if they supported the Union, and impliedly promised better benefits if employees refrained from assisting or supporting the Union.

[1] Respondent's answer admits the allegations that the following named people are supervisors within the meaning of Sec. 2(11) of the Act and agents acting on Respondent's behalf: Herbert R. Herrmann, president; Edward I. Herrmann, treasurer-sales manager; Alvin Berchin, general manager; Joseph M. Marini, service manager; Joseph A. Montenaro, parts manager.

6. Whether on January 1, 1980, Respondent illegally granted wage increases and the benefit of assuming the full cost of medical and hospital insurance in order to dissuade employees from supporting the Union.

7. Whether a strike which commenced on January 3, and which lasted until February 27, 1980, was caused and prolonged by the unfair labor practices allegedly committed by Respondent.

8. Whether Respondent on February 27, 1980, by refusing to reinstate strikers Kenneth Barrett, Eugene Rosenfeld, Richard Neubauer, and Frank DiPasquale to their former positions of employment after they had unconditionally offered to return to work, discriminated against these employees in violation of Section 8(a)(1) and (3) of the Act. In this regard, Respondent contends that it disqualified Barrett, Rosenfeld, and Neubauer from reinstatement because of their alleged strike misconduct. As to DiPasquale, although he was reinstated on February 27, 1980, he was not reinstated to his former position of employment.

9. Whether Respondent, by engaging in the alleged unfair labor practices described above, made a fair and free election impossible and thereby refused to bargain with the Union on December 4 in a unit of service employees in which the Union had obtained majority support.

10. Whether, assuming *arguendo*, that a bargaining order would otherwise be appropriate, the alleged strike misconduct of the Union and employees was of such a nature as to preclude the granting of such an order.

Upon the entire record, including my observation of the demeanor of the witnesses and after due consideration of the briefs filed, I make the following:

## FINDINGS OF FACT[2]

### I. JURISDICTION

The complaints allege, the answers admit, and I find that Respondent is a New York corporation located in New Rochelle, New York, where it operates an automobile dealership which is involved in the retail sale and service of cars. Additionally, Respondent is engaged in the nonretail sale of car replacement parts. Annually, Respondent has gross revenues in excess of $500,000 and purchases goods and materials, such as car replacement parts, in excess of $50,000 which are delivered directly to it from points located outside the State of New York. Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

### II. THE LABOR ORGANIZATION INVOLVED

Respondent admits and I find that Amalgamated Local Union 355, is a labor organization within the meaning of Section 2(5) of the Act.

[2] On September 16, 1980, I denied Respondent's motion to reopen the hearing made on August 11, 1980. A copy of my Order is attached to the Decision as Appendix A. (Appendix A omitted from publication.)

### III. THE APPROPRIATE BARGAINING UNIT AND THE UNION'S MAJORITY STATUS

The parties agree that the appropriate unit for collective-bargaining purposes would include all full-time and regular part-time service employees employed by Respondent at its facility located at 25 Main Street, New Rochelle, New York, exclusive of all office clerical employees, salesmen, guards and supervisors as defined in the Act. It was stipulated that on December 4, 1979, which is the date that the Union demanded recognition, that there were between 18 to 22 service employees in the above-described bargaining unit. It also was stipulated that by December 4, 1979, the Union had obtained valid authorization cards from 14 of the unit employees, which cards designated the Union to represent them for collective-bargaining purposes.

As no evidence was adduced which would negate the authenticity or validity of the authorization cards signed by the employees on behalf of the Union, I therefore find that on December 4, 1979, a majority of the unit employees had designated the Union as their collective-bargaining representative.

### IV. THE ALLEGED UNFAIR LABOR PRACTICES

Robert Kennedy, one of the alleged discriminatees was hired by Joseph Montenaro, the parts manager, on September 11, 1979, and began work as a counterman in the parts department on September 18. Kennedy testified that during the phone conversation with Montenaro, immediately prior to his hire, he asked if Respondent was a union shop. Kennedy states that when Montenaro asked why he made such an inquiry, he responded that he was currently working in a union shop and would need to withdraw his membership if he obtained employment in a nonunion shop. According to Kennedy, Montenaro then stated, "if there was ever a union in this shop, I'll fire everybody . . . . Montenaro did not deny this conversation.

Regarding the hiring of Kennedy, Montenaro in his pretrial affidavit stated, "I hired Robert Kennedy to work as a counterman in September 1979, a new position in the parts department. The new position was added due to increased business. Kennedy was the last person hired." With respect to the parts department, it is noted that Respondent, in addition to providing parts in connection with its retail, sale, and service of vehicles, also sells parts to other body shops on a wholesale basis. In this regard, Alvin Berchin, Respondent's general manager, testified that a majority of this department's business involves the sale, at wholesale, of parts to outside companies.

In November the Union commenced organizing the employees of Respondent, and authorization cards were distributed and signed by employees during the period from November 27 to December 4. Robert Kennedy signed such a card on November 27.

According to employee Kenneth Barrett, Montenaro, on or about November 18, pointed to employee Eugene Rosenfeld and said, "I know he is an instigator and if I

was Mr. Herrmann I would fire him right now."[3] Barrett also testified that on November 27, Montenaro told him that he thought Kennedy was an instigator. Montenaro denied both of these alleged conversations.

On November 28, 1979, a notice was posted by Respondent regarding insurance. The notice read:

> Effective with the turn of the New Year the Company will pick up all costs for Blue Cross-Blue Shield, Major Medical and Dental Plan for all employees, their spouses and dependent children under 19 years of age. The above programs have two restrictions.
>
> 1. A minimum amount of continuing service.
> 2. It cannot be duplicate coverage.
>
> In other words if you have a spouse that is working and they have that coverage, please do not put the Company through the expense as you could only collect one time. This new coverage is in addition to the life insurance already in force with Met Life completely paid for by the Company.

According to Berchin, in January or February 1979, he and the Company's president, Herrmann, decided that Respondent would pick up the full cost of Blue Cross and Blue Shield coverage and determined to accomplish this in a two-step manner. He testified that in the beginning of 1979 it was decided that in July the Company was going to pay for the first $20 of each employee's cost and that in January 1980 the Company would pick up the remainder of the cost. In July, a notice was posted which indicated that Respondent would pay the first $20 of the Blue Cross and Blue Shield coverage. This notice did not, however, indicate that this was to be the first step in a two-step plan and until the above notice was posted on November 28, the employees were never notified that Respondent had made a decision to cover the entire cost of medical insurance. Indeed, in the pretrial affidavit of Joseph Montenaro, the parts manager, he stated that the first time he heard of the Company's decision to pay the full cost of Blue Cross and Blue Shield was in the notice posted on November 28. I also note that Herbert Herrmann, Respondent's president, was not called as a witness in this proceeding, and therefore did not corroborate Berchin's testimony that the decision to cover the entire cost of such medical insurance was made in the beginning of 1979.

In November, and by November 28, 1979, Respondent had laid off five employees. As to these employees, General Counsel does not allege that their layoffs were discriminatorily motivated, and therefore concedes that they were laid off for business reasons.[4] On November 28, 1979, Robert Kennedy was laid off. In support of General Counsel's assertion that Kennedy was discriminatorily laid off on Wednesday, November 28,[5] and not laid off simply for economic reasons as were the five other employees, she relies on the following affirmative evidence. According to Kennedy, during the afternoon of November 28, he spoke to Gus Loaiza, who had previously been laid off, and asked him in the presence of Barrett and Montenaro if he would like to go to a union meeting. Kennedy states that immediately after speaking with Loaiza, Montenaro left the parts department to go to the office. According to Kennedy, at or about 4 p.m. Montenaro told him that he was being laid off. Kennedy testified that he asked Montenaro why he was being laid off and Montenaro said, "it wasn't my decision, it came from the office." Kennedy further testified that when he pressed Montenaro for a reason, he was told, "I don't know, it came from the office." According to Kennedy, he had no prior notification, warnings, or reprimands that he was going to be laid off.

As to the incident on the afternoon of November 28, Barrett, who at that time was employed as the assistant parts manager, testified that he saw Kennedy speaking with Loaiza in the parts department while he, Barrett, was talking with Montenaro. He states that he heard Kennedy talk to Loaiza about a union meeting, whereupon Montenaro left the department to go to the office. According to Barrett, Montenaro told him later in the day that he had told Kennedy that the Company had to lay him off because work was slow.

Montenaro testified that he did not recall seeing Kennedy speak with Loaiza on November 28, and did not overhear a conversation between these two individuals on that day.

According to Barrett, he had a conversation with Montenaro on December 10 at closing time. Barrett testified that during this conversation, Montenaro said, "I know everything that's going on in the building, I know the Union's coming in, Richard Tognetti told me everything."[6] Barrett states that Montenaro went on to say, "I let Bobby go because I [knew] he was a union instigator." According to Barrett, Montenaro asked him if he was involved with the Union, if he had gone to any meetings, or if he had signed a union card. He asserts that Montenaro said that the Union was no good and then said, "Well I'm glad I made the right decision by laying Bobby off because I had to let one of you go. I knew one of you was instigating and I had a suspicion it was Bobby because Bobby had mentioned to me in his . . . job interview. He asked me if it was a union shop and I said no way." Barrett further testified that during this conversation Montenaro mentioned Frank DiPasquale, Mike Stewart, Eugene Rosenfeld, Carmen Nella, and Kennedy as being instigators, and said that Herrmann would rather close the business and reopen it elsewhere if the Union came in. According to Barrett, he told Montenaro that he was not involved with the Union but that he would go to union meetings to hear what they had to say. He states that Montenaro responded by

[3] Eugene Rosenfeld had signed a union card on November 19, 1979.

[4] The evidence establishes that Lee Seacord, a salesman, was laid off on November 6, 1979; that Danny Gore and Gus Loaiza, who worked in the service department, were laid off on November 16 and 27, respectively; and that Jacob Lachner, a mechanic, was laid off on November 27, 1979. Also, the record establishes that Greg Barfield, who worked in the make-ready department, quit on November 16 and that another employee in that department, Eugene Mazzolli, quit in December, thereby requiring the Company to hire Mike Mulrooney as a replacement at that time.

[5] Wednesday is the day when employees are normally paid.

[6] Tognetti is an employee who works in the parts department.

saying, "Well that's your right, you should go, but let me tell you the Union will just take your dues . . . ."

Barrett also recounted a number of other conversations he allegedly had with Montenaro after Kennedy's layoff until January 1980. In one, he testified that Montenaro said, he hoped that Barrett was not getting involved with the Union. In another, Barrett testified that Montenaro pointed to employee Michael Stewart and said, "I can't understand why he is instigating, we treated Mike so good all these years." In the third instance, Barrett states that Montenaro expressed his opinion that Frank DiPasquale was an instigator. Finally, in a fourth instance, Barrett testified that Montenaro said to him, "I'm going to level with you because I like you. I want you to stay with me and I don't think you're involved with the Union." According to Barrett, Montenaro reiterated in this last conversation that Kennedy was let go because he knew Kennedy was a union instigator. Barrett testified that Montenaro further said that he knew the Union was coming in eventually and stated that the reason for the layoffs of Loaiza, Danny Gore, and Jacob Lachner was because they were poor workers whom the Company did not want to get stuck with if the Union came in.

Regarding the above, Montenaro testified that on December 10 he told Barrett that he would like him to stay on because he was doing a good job and that he would get a raise in December. In all other respects, Montenaro denied the version of this December 10 conversation given by Barrett and also denied the other alleged conversations which Barrett related to in his testimony.

According to Berchin, he and Herrmann had a conversation in late September or early October 1979 where they discussed the "climate of the automobile business." He testified that it was decided to cut expenses and retrench the Company's operations because business normally slowed down in December, January, and February, and because the sale of automobiles had been down generally. He states that at this meeting it was decided to cut one employee from the BMW department, to cut one or two from the service department, to cut one from the new car make-ready department, and to cut one employee from the parts department. According to Berchin, after the above-noted discussion with Herrmann, the various department heads were consulted at length in October and November as to whom they thought should be let go. Berchin specifically testified that he spoke to Montenaro for the latter's evaluation of the men in his department. Although Berchin testified that it was left to Montenaro to select the man for layoff, he and Herrmann did recommend that Kennedy be the employee to be laid off. Berchin explained that this recommendation was made on the basis that Kennedy was the last to be hired in the department and also because there were rumors that Kennedy was having arguments with other employees.

Regarding Kennedy's layoff, Montenaro testified that he was told by Berchin and Herrmann to lay off one person in this department and that he chose Kennedy because he had the least seniority. Montenaro also testified that, in late October or early November, Berchin and Herrmann told him that the overhead in the parts department was very high, that the department was not making enough profit, and that business was slow. Montenaro states that at that time he was asked who was the last hired and that Kennedy was described as the least senior man. However, in Montenaro's pretrial affidavit he stated:

> It was entirely my decision to let Kennedy go. I decided to make Kennedy the one to go the same day he was fired or the day before. I did not discuss my choice of who to fire with anyone before I let Kennedy go.

In connection with the testimony by Montenaro to the effect that he was told in October or November 1979 that he had to eliminate one man because business was slow and his department was not making enough profit, the following is a chart of profitability for this department for the months ending May 31, 1979, to April 30, 1980, taken from Respondent's business records:

| *Month* | *Sales* | *Profit* |
|---|---|---|
| 5/31/79 | $53,135 | $10,678 |
| 6/30/79 | 54,237 | 11,343 |
| 7/31/79 | 53,845 | 12,644 |
| 8/31/79 | 52,262 | 10,788 |
| 9/30/79 | 41,259 | 8,839 |
| 10/31/79 | 53,482 | 12,432 |
| 11/30/79 | 52,713 | 12,022 |
| 12/31/79 | 47,344 | 10,204 |
| 1/30/80 (strike) | 27,874 | 4,780 |
| 2/28/80 (strike) | 24,076 | 6,973 |
| 3/31/80 | 38,846 | 6,975 |
| 4/30/80 | 44,725 | 9,233 |

It also is noted that an analysis of the payroll records for the employees working in the parts department, exclusive of Montenaro[7] and two truckdrivers, shows that both before and after Kennedy was laid off, there was a significant amount of overtime by the employees of that department. Thus, for the period from the week ending September 28, to December 28, 1979, immediately prior to the strike, the records show as follows:

| *Wk. Ending* | *Barnett* | | *Tognetti* | | *Kennedy* | |
|---|---|---|---|---|---|---|
| | Reg. | *Ot.* | *Reg.* | *Ot.* | *Reg.* | *Ot.* |
| 8/3/79 | 32 | 2.25 | 40 | 5.5 | | |
| 8/10/79 | 40 | 4.25 | 40 | 4.75 | | |
| 8/17/79 | 40 | 2.75 | 40 | 9.25 | | |
| 8/24/79 | 40 | 3.75 | 40 | 3.25 | | |
| 8/31/79 | 40 | 2.0 | 40 | 3.75 | | |
| 9/7/79 | 32 | 1.5 | 34.75 | -0- | | |
| 9/14/79 | 40 | 2.5 | 40 | 4.5 | | |
| 9/21/79 | 40 | 4.5 | 40 | 12.75 | | |
| 9/28/79 | 40 | 3.0 | 40 | 3.0 | 40 | 0 |
| 10/5/79 | 40 | 2.5 | 40 | 6.5 | 40 | 0 |
| 10/12/79 | 40 | 3.0 | 40 | 3.75 | 40 | 0 |

[7] No records were introduced to show Montenaro's hours and it is presumed that as a manager, Montenaro was paid on a salary basis.

| Wk. Ending | Barnett | | Tognetti | | Kennedy | |
|---|---|---|---|---|---|---|
| | Reg. | Ot. | Reg. | Ot. | Reg. | Ot. |
| 10/19/79 | 40 | 5.0 | 40 | 11.75 | 40 | 0 |
| 10/26/79 | 40 | 2.75 | 40 | 5.75 | 40 | 0 |
| 11/2/79 | 40 | 3.0 | 40 | 10.75 | 40 | 0 |
| 11/9/79 | 40 | 4.5 | 40 | 6.25 | 40 | 0 |
| 11/16/79 | 40 | 2.25 | 40 | 6.75 | 40 | 0 |
| 11/23/79 | 32 | 1.0 | 32 | 7.5 | 32 | 0 |
| 11/30/79 | 40 | 6.25 | 40 | 11.0 | 24 | 0 |
| 12/7/79 | 40 | 13.75 | 40 | 12.75 | | |
| 12/14/79 | 40 | 6.75 | 40 | 5.0 | | |
| 12/21/79 | 40 | 4.0 | 40 | 5.75 | | |
| 12/25/79 | 24 | .75 | 24 | 2.5 | | |

According to Richard Neubauer about 2 weeks before Christmas, Service Manager Joseph Marini took him out for a test drive. Neubauer states that during the ride Marini told him that the Union would screw him, that the Company had put money into the pension and profit-sharing plans and that if the Union came in, the employees would not get that money and that, "if the bosses found out that we went Union, we could get fired or laid off." Marini for his part, states that Neubauer volunteered that his father opposed unions and that he (Neubauer) was not in favor of the Union. According to Marini, he did not respond to Neubauer's statements and he denied the assertions made by Neubauer.

According to Frank DiPasquale, he was told by Berchin and Montenaro in early December that in January 1980 he would be getting a $25 raise and that he could join the pension plan. As to this matter, the evidence shows that the Company gives raises every year in January and that it maintains a pension and profit-sharing plan, participation in which is voluntary on the part of the employees. The record also establishes that the wage increases given each year are dependent on various factors such as merit, length of service, and the rate of inflation. In 1977, the wage increases ranged from $10 to $25 with DiPasquale receiving a $10 raise. In 1978, the wage increases ranged from $10 to $20 with DiPasquale receiving a $15 raise. The range for 1979 was not set forth in the record and the only evidence as to the amounts of such increases is that DiPasquale received a $25 raise and that Barrett, who had been hired in 1979 as a parts counterclerk, received an increase of $30. In the latter regard, however, the record establishes that Barrett had been promoted to the position of assistant parts manager prior to receiving the raise in question.

Eugene Rosenfeld testified that in mid-December he had a conversation with Montenaro who said that if he voted for the Union he would lose the pension and profit-sharing benefits and that if he did not support the Union he would get a good deal on overtime and be allowed early entry into the profit-sharing pension and plan. Montenaro denied this conversation.

On January 2, 1980, employees of the Company held a meeting where they voted to strike. The evidence establishes that the vote to strike was motivated, at least in part, by the layoff of Kennedy, and after discussion of the various alleged statements made to employees by Respondent's agents. On January 3, the strike commenced and about 14 or 15 of Respondent's employees participated in the strike. Among the employees who struck were Kenneth Barrett, Eugene Rosenfeld, Frank DiPasquale, Michael Stewart, Trevor McCook, Richard Neubauer, Michael Mulrooney, Andre Ramariez, and Victor Spencer.

In relation to the strike, Respondent alleges that there was a substantial amount of vandalism and property damage and that specific acts of misconduct were committed by Barrett, Rosenfeld, and Neubauer.

With respect to Neubauer, Larry Herrmann[8] testified that in early January, as he was looking out the window, he saw Neubauer move his hand across a car parked on Respondent's property. He states that when Neubauer walked away he saw Neubauer put something in his pocket and that when he went to look at the car, he saw that it was scratched. Edward Herrmann testified that about 9:15 a.m. he saw Neubauer extend his arm against the car which when examined showed a 12- to 15-inch scratch on the door costing $180 to repair. He states that when Neubauer walked away from the car it appeared that Neubauer put an object back in his pocket. Neither witness, however, actually saw Neubauer touch the car with any type of object and neither could say with any certainty that Neubauer actually had an object in his hand. Edward Herrmann testified that the particular vehicle had come into the lot on that day and that he had examined it at 9 a.m. He states that his examination of the car prior to the incident showed no scratches. Neubauer denied making any scratch on the car or touching it in any manner.

In connection with Rosenfeld, Respondent contends that during the strike he threw an object over the fence on Respondent's premises which resulted in damage to a BMW in the amount of $125. Respondent also contends that Rosenfeld threatened a truckdriver. These allegations were denied by Rosenfeld.

Mary Pacetti, Respondent's bookkeeper, testified that on or about January 25, at 9:30 a.m., she saw Rosenfeld throw something over the fence which hit the trunk of a BMW. She states that she saw that Rosenfeld was standing about 6 to 8 feet from the fence, which is about 7 feet high. She also states that she did not actually see what object was thrown, although she saw something bounce. She could not estimate the size, shape, or color of the object and testified that the object was never found. In the latter regard, Pacetti testified that at the area where the BMW was parked, there were pot holes on the ground and broken up concrete. According to Larry Herrmann, he saw Rosenfeld make a hurling motion and saw some type of object go over the fence. He states that when he then examined the BMW it had a dent on its trunk which was about the size of a fist. He indicates that the object was thrown with great velocity, similar to the throwing of a baseball or a hook shot in basketball. The BMW, he explained, was parked next to the fence at a right angle to it, thus protruding about 15 feet, and that the object was thrown on an angle which commenced from beneath the top of the fence. He also

[8] Larry Herrmann is a salesman and is also a son of the Company's president

testified that the object could not be found, although his testimony was that the ground near the car was smooth and not littered with loose concrete.

As to other incidents involving Rosenfeld, George Dedivanovic, a truckdriver employed by Respondent, testified that on one occasion sometime in February, he was followed by a car and that the driver of the car yelled, "why don't you come out because we're going to kill you." Although Respondent attributes these remarks to Rosenfeld, Dedivanovic could not identify the driver other than by describing him as a short, chubby man. Dedivanovic also testified to another incident, wherein Rosenfeld was identified. In this second incident, Dedivanovic testified that he saw Rosenfeld and DiPasquale follow a truckdriver to a lot owned by Respondent after they had talked to the driver who was trying to make a delivery at Respondent's facility. He testified that when the delivery truck came to the lot, Robert Kennedy drove his car in front of the trailer and Rosenfeld drove up behind the trailer so that it could not enter the lot. He testified that the police were then called and that they told Kennedy and Rosenfeld to remove their vehicles. Kennedy did move his car out of the way but Rosenfeld did not, and was placed under arrest. Shortly thereafter, the latter's car was moved and the truck entered the lot.

With respect to Barrett, the testimony discloses that after the truck-blocking incident described above, Barrett approached the Company's showroom window, yelled at Herrmann, and banged against the window where he was standing. Respondent contends that Barrett hit the window with his fist in a manner intended to break it. Barrett testified that he fell over a ledge between the bushes and the window and that he banged into the window merely in an attempt to break his fall. In any event, the window was not broken at this time and it is difficult for me to believe that Barrett intended to break the window with his bare hands, a result which could have resulted in serious injury to himself.

In addition to the above-noted incidents, Respondent also adduced testimony concerning a general rise of vandalism at its premises during the period of the strike. However, no evidence was presented to show that the acts of vandalism were attributable to any particular individual or individuals. Respondent nevertheless asserts that this vandalism is attributable generally to the striking employees and the Union because of the low incidence of vandalism both before and after the strike. In this regard, Respondent cites the following:

1. Bricks thrown through the showroom windows, which broke the windows and damaged about three or four cars.

2. Nails found in the tires of cars owned either by the Company or employees who worked during the strike. According to the testimony of Marini, he saw on one occasion a striking employee, Mike Mulrooney, throw nails on the driveway. He also testified that about five cars had tire damage during the strike.

3. Marini testified that there were three cars that sustained damage to their windshields.

On February 27, 1980, the strikers went to the Company where they made an unconditional offer to return to work. At that time, the Company acceded to this offer except to the extent that it refused to reinstate Barrett, Neubauer, and Rosenfeld citing the fact that criminal charges were pending against each of them for strike misconduct. As to Frank DiPasquale, although he was reinstated, he was transferred to the job of utility man which involved, among other things, cleaning cars. Prior to the strike, DiPasquale was employed as a truckdriver.

On April 11, 1980, the Company sent mailgrams to Richard Neubauer and Kenneth Barrett offering them full and immediate reinstatement to their former positions of employment. They were directed to return to work no later than April 16, 1980, at 8 a.m. or otherwise give notice of their intentions. Neither employee accepted the offers of reinstatement and on April 17, 1980, the employer sent letters to each, indicating its position that they voluntarily abandoned their jobs.

## V. CONCLUDING FINDINGS

### A. *The Layoff of Robert Kennedy*

The issue here is whether Kennedy was laid off on November 28 for economic reasons or because of discriminatory reasons. In evaluating the facts it must first be ascertained whether the General Counsel has made a sufficient showing "to support the inference that protected activity was a 'motivating factor' in the employers decision," which if shown shifts the burden on Respondent "to demonstrate that the same action would have taken place even in the absence of protected conduct." *Wright Line, a Division of Wright Line, Inc.*, 251 NLRB 1083 (1980).

In the instant case the facts unequivocally establish that the Union commenced its organizational activities amongst the employees of Respondent in November 1979 and that Kennedy signed an authorization card for the Union on November 27, the day before his layoff. It also is established that Joseph Montenaro, the parts department manager, was opposed to unions generally as Kennedy testified without contradiction that, during his conversation with Montenaro at the time of his hire, the latter said that if there was ever a union in the shop he would fire everybody. The credible evidence also establishes that on November 28, 1979, Kennedy, in a conversation overheard by Barrett and Montenaro asked Loaiza if he was going to attend a union meeting, after which Montenaro abruptly left, went into the office and shortly thereafter notified Kennedy that he was being laid off. In this respect, I credit the testimony of Kennedy as to this transaction which was corroborated by Barrett and I do not credit the denial by Montenaro. Both Kennedy and Barrett impressed me as forthright witnesses whereas Montenaro's testimony had a number of inconsistencies which will be described below. Further, the credited testimony of Barrett reveals that, about 10 days prior to November 28, Montenaro pointed out another employee, Eugene Rosenfeld, whom he described as a union instigator thereby establishing Respondent's knowledge of the union activity among its employees.

Further affirmative evidence showing the discriminatory nature of Kennedy's layoff is shown by the testimony of Barrett that on December 10 and on one other occa-

sion before January 2, 1980, Montenaro told him that Kennedy was selected for layoff among the parts department employees because he was a union instigator. While such an open admission made by a supervisor to an employee is not always plausible, it must be recalled that at the time of this conversation, Barrett had been promoted to assistant parts manager and, therefore, was someone in whom Montenaro might plausibly confide.

With respect to Respondent's defense, it would appear that there did exist justification for laying off some of its employees for economic reasons as it is recognized that the sale of automobiles, especially American made vehicles, was undergoing a significant decline at the time these events took place. Moreover, it is not unreasonable to conclude that Respondent was in a position to reasonably speculate in October and November 1979 that further declines were imminent for the immediate future. As such, I credit Berchin's testimony that, in late October or early November 1979, he and Herbert Herrmann did discuss the "climate of the automobile business" and did decide at that time to reduce the number of people employed by the Company. Indeed the evidence establishes that during November the Company did layoff five other employees for economic reasons, a contention which is conceded by General Counsel as she did not allege these layoffs as being discriminatory in nature. The critical question here, however, is whether Berchin and Herrmann also decided to layoff an employee in the parts department and whether the ultimate decision to lay off Kennedy was untainted by discriminatory motivation or would otherwise have occurred despite his union activity.

Although Berchin testified that the decision to layoff an employee in the parts department was made in late September or early October. It is noted that Kennedy was hired in mid-Septemher due to increased business in that department. Moreover, Berchin and Montenaro assert that Montenaro was consulted in late October or early November as to who in the parts department should be laid off and that it was the consensus of Berchin, Herrmann, and Montenaro that it should be Kennedy. However, Montenaro in his pretrial affidavit stated that it was his decision to let Kennedy go, that his decision was made on November 27 or 28, and that he did not discuss his decision with anyone before letting Kennedy go. Montenaro also testified that at the time he was told by Berchin and Herrmann to layoff an employee in the parts department, he was told that the reason was because overhead in the department was very high, that this department was not making enough profit and that business was slow. Nevertheless, the sales and profit figures for the parts department show that in October and November profits were at or near their highest point during the period from May 1, 1979, through April 30, 1980, and that the employees in that department were working significant amounts of overtime before and after Kennedy was laid off. In the latter regard, the payroll records show that during the week ending November 30 the amount of overtime for two employees was 17 hours and that in the week following Kennedy's layoff the amount of overtime was 26 hours. Finally, while I can understand the Company's assertion that it made a projection regarding vehicles sales I do not see, on the basis of this record, the efficacy of a projection for parts sales which would not appear to be related to the number of vehicles sold but rather would be related to the number of breakdowns of vehicles already in the public's hands.

In summation, I do not credit Berchin's testimony that in late September or early October he and Herbert Herrmann decided to eliminate an employee from the parts department as I am not persuaded that the reasons asserted conform to the evidence presented. Not only was Berchin's testimony regarding the consultation and discussion between himself, Herrmann, and Montenaro inconsistent with Montenaro's pretrial affidavit, but I cannot help but note that the other participant in the alleged decision, namely, Herrmann was not called as a witness by Respondent to corroborate its defense. *Fred Stark and Jamaica, 201 St. Corp., Inc. and Jamaica 202 St. Corp., Inc.*, 213 NLRB 209, 213, 214 (1974); *Gulf-Wandes Corporation*, 233 NLRB 772, 777 (1977). Accordingly, based on the record as a whole it is concluded that the layoff of Kennedy on November 28 was motivated by discriminatory reasons in violation of Section 8(a)(1) and (3) of the Act.

### B. *The Promises and Grants of Health Insurance Benefits and Wage Increases*

As noted above, I have concluded that prior to November 28, Respondent was aware of the Union's organizational campaign amongst its employees. Accordingly, the announcement on November 28 that the Company was going to pay for the full cost of medical insurance would, *prima facie*, be violative of Section 8(a)(1) of the Act inasmuch as it would, in the absence of rebuttal evidence, raise the inference that the granting of such a benefit was designed to the influence employees to withhold their support for the Union. *N.L.R.B.* v. *Exchange Parts Co.*, 375 U.S. 405 (1964). In cases where an employer grants a benefit during a period of union activity, the legality of such an act depends upon whether the transaction either conforms to a past practice or had been planned and determined prior to the employees' union activity. *Starbrite Furniture Corp.*, 226 NLRB 507, 510 (1976); *Gould, Inc.*, 221 NLRB 899, 906 (1975). In the instant case, Respondent asserts that back in January or February 1979 it had decided to pay for the employees' Blue Cross and Blue Shield coverage and that it was then determined to implement this decision in a two-step process, the final step to take place in November 1979. The problem with Respondent's defense is that I do not credit Berchin's testimony on this issue.

The evidence herein establishes that in July Respondent posted a notice informing its employees that the Company was going to pay for the first $20 of their medical coverage. Nevertheless, and despite Berchin's assertion that this notification was simply the first step of a two-step process, the notice itself did not so indicate. Moreover, the two-step nature of the plan was never announced to any of the employees and it appears that even the Company's supervisors were ignorant of the plan as the record discloses that Montenaro did not know that the Company intended to pay the full cost of

medical insurance until the November 28 announcement. Thus, this record indicates that the only people who were aware of the "plan" were Berchin and Herbert Herrmann. Of these two, Respondent chose to call only Berchin as a witness, a decision which to my mind casts a substantial doubt about the plan's prior existence. I, therefore, do not credit Respondent's assertion that the decision to pay the full cost of the Blue Cross and Blue Shield insurance was made in January or February 1979. Rather, I conclude that, having decided to pay for the first $20 of such medical coverage in July, the Respondent found it expedient to pay the remaining cost when it became apparent that the Union was organizing its employees. I therefore conclude that by promising this benefit on November 28 and by implementing the promise in January 1980, Respondent violated Section 8(a)(1) of the Act.

The promises and grants of wage increases are, however, a different matter. In this respect, the record establishes that merit raises are granted to the Company's employees each January. The record also establishes that the size of such increases is dependent on a number of factors including seniority, merit, and the rate of inflation, which has increased in each year. That Respondent promised certain employees that they would get wage increases in January and granted such wage increases at that time does not, of itself, raise an inference of illegality in light of the Company's past practice. Nor do I conclude that the size of the wage increases granted to DiPasquale or Barrett were disproportionally large so as to raise an inference that the amounts were designed to influence their union sympathies. In DiPasquale's case, he received raises in prior years, respectively, of $10 and $15 and his raise of $25 in January 1980 would appear to be part of a pattern. Although Barrett received a raise of $30 in January 1980, while he was still a relatively junior employee, it nevertheless is reasonable to assume that the amount of this merit raise was due, in part, to his promotion from parts counterclerk to assistant parts manager. As such, it is concluded that in this respect Respondent did not violate the Act.

### C. *Other 8(a)(1) Conduct*

As previously described, I have concluded that Barrett was a forthright and candid witness. I therefore find that when Montenaro told Barrett that he knew Rosenfeld was a union instigator and that he would fire him if he were Herrmann, Respondent violated Section 8(a)(1) by threatening to discharge employees because of their union activity. I also conclude that on December 10, 1979, Montenaro told Barrett that Kennedy was let go because he was a union instigator, that he questioned Barrett as to whether he was involved with the Union, had gone to union meetings, and had signed a union card, and that Montenaro told Barrett that Herrmann would rather close the business and reopen it elsewhere if the Union came in. Accordingly, I find that Respondent violated Section 8(a)(1) of the Act, respectively, by threatening to discharge employees who supported the Union, interrogating employees regarding their union activities and sympathies, and threatening plant closure if the Union was selected by the employees as their representative.

On demeanor grounds, and also based on the consistency of their testimony, I shall credit the testimony of Neubauer and Rosenfeld. Therefore, I find that in early December 1979 Joseph Marini told Neubauer that if the employees chose the Union to represent them they could lose the profit-sharing plan. I also find that Marini told Neubauer, "that if the bosses found out we went union we could get fired or laid off." In my opinion these statements constitute threats of discharge and threats of loss of existing benefits in violation of Section 8(a)(1) of the Act. *American Tara Corporation, American Carbon Paper Division*, 242 NLRB 1230 (1979); *Travis Meat & Seafood Company, Inc.*, 237 NLRB 213 (1978). Based on the credited testimony of Rosenfeld, I also find that in mid-December Montenaro told him that if the Union got in the employees would lose the pension and profit-sharing benefits, and that he further told Rosenfeld that if Rosenfeld did not support the Union he would receive a good deal in overtime and he would get early entry into the pension and profit-sharing plan. In these respects, I conclude that Respondent violated Section 8(a)(1) of the Act.

### D. *The Strike and the Refusal To Reinstate Neubauer, Barrett, Kennedy, and DiPasquale to Their Former Positions of Employment*

On January 2, 1980, employees of Respondent held a meeting at which they voted to engage in a strike. The record herein reveals that at least part of the reason that these employees voted to strike was due to the layoff of Kennedy. Also they were motivated to strike when they recounted the various statements made to them by Respondent's agents as described above. As I have concluded that the layoff of Kennedy was an unfair labor practice and as I have also found that Respondent violated Section 8(a)(1) of the Act by various statements made to employees in November and December, I therefore conclude that the strike which commenced on January 3, 1980, was an unfair labor practice strike. *N.L.R.B.* v. *Birmingham Publishing Company*, 262 F.2d 2, 9, 10 (5th Cir. 1959); cf. *Romo Paper Products Corp.*, 208 NLRB 644, 653, 654 (1974).

On February 27, the strikers unconditionally offered to go back to work. At that time, Respondent accepted this offer from most of the strikers who did return to work. However, Respondent refused to reinstate Neubauer, Barrett, and Rosenfeld on the grounds that they had allegedly been involved in strike misconduct. As to DiPasquale, although Respondent did reinstate him, he was reassigned the next day from being a truckdriver to being a utility man. (During the strike Respondent had hired another man to be a truckdriver to replace DiPasquale.) Although DiPasquale did not suffer a reduction in his wage rate as a result of this reassignment, it is evident that DiPasquale preferred his former position as a truckdriver. Additionally, he testified that as a utility man he did not work overtime which he had done as a truckdriver.

It is well settled that employees who engage in an unfair labor practice strike are entitled to reinstatement to their former positions of employment upon their unconditional offer to return to work. *Mastro Plastics Corp., et al. and French-American Reeds Mfg. Co. Inc.* v. *N.L.R.B.*, 350 U.S. 270, 278 (1956). This duty to unfair labor practice strikers includes the duty to recall such employees even if requiring the discharge of strike replacements. *General Drivers and Helpers Union, Local 662 affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America [Rice Lake Creamery Company]* v. *N.L.R.B.*, 302 F.2d 908, 911 (D.C. Cir. 1962), cert. denied 371 U.S. 827. I therefore conclude that by failing to recall DiPasquale to his former position as a truckdriver when he offered to return to work, Respondent discriminated against him in violation of Section 8(a)(1) and (3) of the Act. Although it is not clear from this record the extent to which DiPasquale may have suffered a loss of earnings due to his reassignment, such loss, if any, may be determined at the compliance stage of the proceeding by calculating the amount of overtime worked by the two truckdrivers employed by Respondent or by DiPasquale's replacement from February 27, 1980, to such time as DiPasquale is offered his former position of employment, less the amount of overtime he may have worked in his position as a utility man.

With respect to Barrett, Neubauer, and Rosenfeld, Respondent argues that they should be disqualified from reinstatement because of their alleged strike misconduct. In this regard, the Board in *General Telephone Company of Michigan*, 251 NLRB 737 (1980), reiterated the legal principles applicable to strikes and alleged strike misconduct. In pertinent part, the Board stated:

> The law is clear that when an employer disciplines an employee because he has engaged in an economic strike, such discipline violates Section 8(a)(3) and (1) of the Act. An employer may defend its action by showing that it had an honest belief that the employee disciplined was guilty of strike misconduct of a serious nature. If the employer is able to establish such a defense, then the General Counsel must come forward with evidence that either the employee did not engage in the conduct asserted, or that such conduct was protected. The burden then shifts back to the employer to rebut such evidence. While Section 7 and 13 of the Act grant employees the right to strike, picket, and engage in other concerted activity for their mutual aid and protection, not all conduct which occurs in the course of a labor dispute is within the purview of Section 7 and 13.
>
> * * * * *
>
> In short, the seriousness of each act of misconduct alleged must be analyzed and the cases of mere "animal exuberance" differentiated from those in which the misconduct is so flagrant or egregious as to require subordination of the employee's protected rights in order to vindicate the broader interests of society as a whole. And while an employer may premise its belief of striker misconduct on reports from its guards and other written reports, it cannot rely upon a mere showing of general violence and destructive activity. It must rely instead on specific misconduct of the strikers whom it disciplined. The mere fact that there may have been misconduct engaged in by some strikers does not without more impute culpability to the individual employees disciplined. Moreover, unauthorized acts of violence on the part of individual strikers are not chargeable to other strikers in the absence of proof that identifies them as participating in such violence.
>
> * * * * *
>
> We note in passing that the burden of establishing an "honest belief" of misconduct requires more than the employer's mere assertion that an "honest belief" of such misconduct was the motivating force behind the meting out of discipline. Meeting the burden also requires more than a general statement about the guidelines used in establishing the alleged "honest belief." Rather, it requires some specificity in the record, linking particular employees to particular allegations of misconduct.

The principles described above relating to economic strikes are also applicable to unfair labor practice strikes, except that in the latter case the Board in determining whether to disqualify a striker's right of reinstatement will also balance the severity of the strike misconduct with the severity of the employer's unfair labor practices. *Transportation Enterprises Inc.*, 240 NLRB 551, 557 (1979); *Coronet Casuals, Inc.*, 207 NLRB 304, 305 (1973).

With respect to Barrett, Respondent asserts that because he hit the showroom window on December 25 this is sufficient to warrant his disqualification from reinstatement. I do not agree. Whether Barrett intended to hit the window with enough force to break it, is in a way irrelevant as no damage was in fact done. While the record does indicate that this window was later broken, there is no direct evidence to link this action to any of the strikers and no evidence of any kind to link this action to Barrett. Accordingly, I find that Respondent has not met its burden regarding Barrett and conclude that by denying him reinstatement on February 27 Respondent violated Section 8(a)(1) and (3) of the Act.

Regarding Rosenfeld, Respondent asserts that he should be disqualified for reinstatement because he allegedly threw an object which damaged a car, because he allegedly threatened a truckdriver, and because he blocked the entry of a truck making a delivery to a lot owned by Respondent.

As to the alleged threat, Dedivanovic testified that on one occasion the driver of the car in which DiPasquale was a passenger threatened him with physical violence. However, apart from his description of the driver as a short chubby man, he could not offer any further identification. With respect to the blocking incident, the evidence established that, when the truck tried to enter the lot, Rosenfeld drove his car in such a way as to prevent

its entry. However, the evidence established that this blockage was of a short duration and was isolated in nature. See *Owen Joist Corporation*, 248 NLRB 589, 595 (1980).

The incident involving the BMW is, in my opinion, more serious if it happened. It nevertheless seems to me that Respondent's witness gave somewhat conflicting accounts of this event. It is clear for example, that whatever the object was, it could not be found. As to the failure to find the object, Mary Pacetti explained that there were pot holes and broken up concrete at the place where the BMW was parked. However, this assertion was contradicted by Larry Herrmann who testified that the ground where the car was parked was smooth. I might also add that the description of this event by Larry Herrmann seems to defy the laws of nature. He pointed out that the car was parked next to a fence which was about 7 feet high. He demonstrated that Rosenfeld threw the object with great force in a hurling motion on a trajectory which started from below the fence and then crossed its top. Assuming that the object was of a weight and size to be thrown in such a manner (like a baseball) it would seem to me that its trajectory would have carried it far beyond the BMW, which was parked next to the fence. On the other hand, if the object was sufficiently large and heavy, it could not have been thrown in the manner described by Herrmann and if it had hit the trunk of the car it could not have bounced so far as to have made its recovery impossible. Inasmuch as the testimony of Respondent's witnesses leaves me with substantial doubt as to the allegation that Rosenfeld threw an object over the fence which damaged the car and as Rosenfeld credibly denied the incident, it is concluded that Respondent has not met its burden of proof on this matter. Also, it is my opinion that Respondent has not shown that Rosenfeld was the author of the threat to Dedivanovic or that the truck-blocking incident was of a serious nature. I therefore conclude that, by failing to reinstate Rosenfeld on February 27, Respondent violated Section 8(a)(1) and (3) of the Act.

As to Neubauer, the testimony of Respondent regarding his alleged misconduct was illicited through Larry and Edward Herrmann. In summary, they testified that they observed Neubauer approach a vehicle on the lot, put his hand next to the car door, and then appeared to put something in his pocket. They further testified that when they examined the car they saw that there was a scratch made on the door. Neither actually saw Neubauer touch the car door which was facing away from the point of their observation and neither actually saw any type of object in Neubauer's hand. As Neubauer credibly denied this allegation and as the testimony of Respondent's witnesses is not, in my opinion, sufficiently persuasive to attribute the scratch to Neubauer's conduct, it is my conclusion that Respondent has not carried its burden on this issue. Accordingly, I conclude that by failing to reinstate Neubauer on February 27, Respondent violated Section 8(a)(1) and (3) of the Act.

### E. *The 8(a)(5) Allegation*

In *N.L.R.B.* v. *Gissel Packing Co., Inc.*, 395 U. S. 575 (1969), the Supreme Court distinguished between three categories of cases as to the propriety of granting a bargaining order. The first category involves the "exceptional" cases where "outrageous" and "pervasive" unfair labor practices are committed. The second category concerns the "less pervasive practices" that have a tendency to undermine majority strength and impede the election process. In this second category the Court concluded that a bargaining order would be appropriate to remedy an employer's unlawful conduct making a fair election unlikely where at some point the Union had majority support among the employees. The third category of cases concerns those in which minor or less extensive unfair labor practices have been committed, having a "minimal impact" on an election. In this last category the Court held that a bargaining order is inappropriate to remedy the violations committed.

Respondent argues that the alleged conduct, even if committed, would not be sufficient to warrant the granting of a bargaining order. I do not agree. I have concluded that Respondent illegally laid off employee Robert Kennedy on November 28 and that on the same day it illegally promised increased medical benefits which were thereafter implemented in order to induce employees to withhold their support for the Union. As to the promises and grants of benefits, the Supreme Court in *N.L.R.B.* v. *Exchange Parts Co.*, 375 U.S. 405, 409 (1964), stated:

> The danger inherent in well-timed increases in benefits is a suggestion of a fist inside a velvet glove. Employees are not likely to miss the inference that the source of benefits now conferred is also the source from which future benefits must flow and which may dry up if it is not obliged.

Although some have suggested that the promising or granting of benefits should not be a sufficient basis for the granting of a bargaining order, the Board recently stated in *J. J. Newberry Co., a Wholly Owned Subsidiary of McCrory Corporation*, 249 NLRB 991 (1980):

> Respondent's grant of a substantial wage increase to all unit employees in violation of Section 8(a)(1) of the Act is sufficient to render it unlikely that a fair election could be held. Thus, the Board has long recognized that employees are not likely to miss the inference that the source of benefits now conferred is also "the source from which future benefits must flow and which may dry up if not obliged . . . ." Here, the unlawful grant of benefit was only one of numerous unfair labor practices by Respondent which were clearly designed to undermine the Union's majority status by promising to grant, and actually granting employees much if not all of what they were seeking from union representation. Accordingly, we find that a bargaining order is necessary and appropriate to protect the majority sentiment expressed through authorization cards and to remedy otherwise the violations committed.

In the instant case, I have concluded that Respondent has also violated the Act by threatening employees with a loss of existing benefits if they selected the Union to

represent them, threatened to discharge employees, and close the facility if a union came in, interrogated employees regarding their union activities and sympathies, and illegally refused to reinstate unfair labor practice strikers. Respondent's conduct in the aggregate would, in my opinion, make the holding of a fair and free election impossible. To be sure, it cannot be said with absolute certainty that an election held after Respondent has remedied these unfair labor practices could not be conducted or that the Union would have no chance of success. Nevertheless, despite the fact that a determination of the subjective impact of the Employer's conduct and the possibility of holding a fair election is fraught with a degree of uncertainty, that condition is one which was caused by Respondent's conduct. Although the Supreme Court in *N.L.R.B.* v. *Gissel Packing Co., supra*, noted that sentiment for a union as expressed by signed authorization cards may not be the most reliable test of a union's majority support, the Court also noted that a lack of desire for union representation as expressed in an election which is tainted by serious employer misconduct is an even more unreliable test of employees' sympathies.

Respondent also asserts that a bargaining order should be withheld because of the Union's conduct during the strike. In *Herbert Bernstein, Alan Bernstein, Laura Bernstein, a co-partnership d/b/a Laura Modes Co.*, 144 NLRB 1592 (1963), the Board stated:

> We do not, however, deem it appropriate to give the Charging Union the benefit of our normal affirmative bargaining order in the circumstances of this case. For we cannot, in good conscience, disregard the fact that, immediately before and immediately after it filed the instant charges, the Union evidenced a total disinterest in enforcing its representation rights through the peaceful legal process provided by the Act in that it resorted to and/or encouraged the use of violent tactics to compel their grant. Our powers to effectuate the statutory policy need not, we think, be exercised so single-mindedly in aiming for remedial restoration of the *status quo ante*, that we must disregard or sanction thereby union enforcement of an employer's mandatory bargaining duty by unprovoked and irresponsible physical assaults of the nature involved here. We recognize of course that the employees' right to choose the Union as their representative survives the Union's misconduct. But we believe it will not prejudice the employees unduly to ask that they demonstrate their desires anew in an atmosphere free of any possible trace of coercion. Our order here and the voluntary agreement of the Union, as part of its October 29, 1962, settlement of the 8(b)(1)(A) charges filed against it, to refrain from any and all misconduct of the kind mentioned in the charges, will, we believe, afford the employees with the desirable conditions for making their free choice. We conclude that, in the particular circumstances of this case, the policies of the Act and the legitimate interests of the public and the parties will best be served by denying to the Union the right to invoke our statutory processes in aid of a demand for recognition as bargaining representative of Respondents' employees unless and until it demonstrates its majority among those employees through the Board's election procedures.

Although the Board in *Laura Modes Co., supra*, withheld a bargaining order, it has also stated that this would constitute "an extraordinary remedy" against a union which would otherwise be entitled to a bargaining order. As pointed out in *Daniel A. Donovan, Charles Brennick and John Brennick, Co-Partners doing business under the trade name and style of Daniel A. Donovan, d/b/a New Fairview Convalesant Home*, 206 NLRB 688, 689 (1973), enfd. 520 F.2d 1316 (2d Cir. 1975):

> We do not condone any picket line violence, and the processes of the Board are available to prevent its recurrence . . . . But we are also reluctant to deprive a substantial group of employees of the benefits of collective bargaining because of the misconduct of a few miscreants. Here, looked at in perspective, there were but few instances of misconduct by a relatively small proportion of strikers . . . against a background of Respondent's frequent and recurring unfair labor practices. Viewed in that light . . . we have concluded that the extraordinary sanction of withholding an otherwise appropriate remedial bargaining order would not best effectuate the policies of the Act.

In *Maywood Plant of Grede Plastics, a Division of Grede Foundries, Inc.*, 235 NLRB 36 (1978), the Administrative Law Judge reviewed many of the cases on this issue. The Administrative Law Judge's analysis reveals that the Board has relied on a number of factors as follows; the extent of the Union's interest in pursuing legal remedies, the extent to which the evidence shows deliberate planning of violence and intimidation on the part of the Union, the extent to which the assaults or other misconduct were provoked, the duration of the Union's conduct, and the relative gravity of the Union's misconduct *vis-a-vis* the Employer's misconduct. In the instant case, except to the extent that the evidence discloses that striking employee Mulrooney threw nails in the driveway and the incident where Barrett hit the showroom window, the evidence is insufficient to disclose that the other property damage suffered by Respondent and its employees was attributable to any union representatives or to any particular strikers. Indeed, as a general matter, Respondent's evidence showing attribution of this damage was by way of evidence indicating that prior to, and after the strike, it suffered less damage due to vandalism. Whether such circumstantial evidence is sufficient to impute the cause of such damage to the Union is, to a degree speculative. However, even if such property damage were attributable to the strikers and/or the Union it does not seem to me that this conduct was of such an eggregious nature or was without adequate remedy by other means[9] so as to preclude the employees

[9] Sec. 8(b)(1)(A) of the Act could provide a remedy for union acts of property damage. Also nothing in this Act would preempt the Employer

*Continued*

from enjoying their collective-bargaining rights. I therefore shall reject Respondent's contention on this issue and grant General Counsel's request for a bargaining order.

Having concluded that Respondent is obligated to bargain with the Union I shall recommend that the bargaining order be retroactive to the date of the Union's demand for recognition. I therefore shall also conclude that when the Company, in January 1980, took over the full cost of the medical insurance, it unilaterally granted a benefit without consultation or bargaining with the Union, in violation of Section 8(a)(1) and (5) of the Act. *Taylor Bros., Inc.*, 230 NLRB 861 (1977); *Broadmoor Lumber Company*, 227 NLRB 1123 (1977).

Upon the foregoing findings of facts and upon the entire record herein and pursuant to Section 10(b) of the Act, I make the following:

## CONCLUSIONS OF LAW

1. Respondent, Pace Oldsmobile Inc., is and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Amalgamated Local Union 355 is a labor organization within the meaning of Section 2(5) of the Act.

3. All full-time and regular part-time service employees employed by Respondent at its facility located at 25 Main Street, New Rochelle, New York, exclusive of all office clerical employees, salesmen, guards and supervisors as defined in Section 2(11) of the Act constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(a) of the Act.

4. At all times since December 4, 1979, the Union has been the exclusive collective-bargaining representative of the employees in the above described unit within the meaning of Section 9(a) of the Act.

5. By laying off Robert Kennedy on November 28 because of his membership in or activities on behalf of the Union, Respondent violated Section 8(a)(1) and (3) of the Act.

6. By promising and granting medical insurance coverage at Respondent's expense and by promising other benefits such as increased overtime and early entry into Respondent's pension and profit-sharing plan in order to induce employees to withhold their support for the Union, Respondent has interfered with its employee's Section 7 rights and violated Section 8(a)(1) of the Act.

7. By threatening the discharge of employees who support the Union and by threatening to close its facility if the Union was selected as the employees' collective-bargaining representative, Respondent violated Section 8(a)(1) of the Act.

8. By interrogating employees regarding their membership in, or support for the Union, Respondent violated Section 8(a)(1) of the Act.

9. By refusing, on December 4, 1979, to recognize and bargain with the Union as the exclusive collective-bargaining representative in the unit described above, Respondent violated Section 8(a)(1) and (5) of the Act.

10. By unilaterally granting to its employees, on or about January 1, 1980, the benefit of assuming the full cost of Blue Cross and Blue Shield insurance, Respondent violated Section 8(a)(1) and (5) of the Act.

11. The strike which commenced on January 3, 1980, was at all times caused and prolonged by Respondent's above-described unfair labor practices and was an unfair labor strike.

12. By refusing to reinstate strikers Kenneth Barrett, Eugene Rosenfeld, Richard Neubauer, and Frank DiPasquale to their former positions of employment upon their unconditional offers to return to work, Respondent discriminated against employees for engaging in protected concerted activity and for supporting the Union, and thereby violated Section 8(a)(1) and (3) of the Act.

13. The promises and grants of wage increases to employees Barrett and DiPasquale were not violative of the Act.

14. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

## THE REMEDY

It is established that valid offers of reinstatement were made by Respondent to employees Neubauer and Barrett on or about April 16, 1979. It also is established that these offers of reinstatement were declined by the two employees. It therefore is concluded that it is not appropriate to order Respondent to offer reinstatement to these employees and I conclude that the backpay period for them was tolled on the date of the offer. Regarding DiPasquale, I shall, as noted above, recommend that Respondent offer to reinstate him to his former position of employment as a truckdriver and to make him whole for the loss of any overtime earnings he may have suffered from February 27, 1980. As to Rosenfeld, I shall recommend that Respondent offer to reinstate him to his former position of employment and that Respondent make him whole for any loss of earnings he may have suffered from February 27, 1980. Additionally, I shall recommend that Respondent offer reinstatement to Robert Kennedy and make him whole for any loss of earnings he may have suffered since November 28, 1979. Backpay in all instances shall be computed in the manner prescribed by *F. W. Woolworth Company*, 90 NLRB 289 (1950), plus interest as set forth in *Florida Steel Corporation*, 231 NLRB 651 (1977).

IT IS FURTHER RECOMMENDED that Respondent be ordered to recognize and bargain with the Union as the exclusive collective-bargaining representative of the employees in the unit found appropriate herein.

[Recommended Order omitted from publication.]

---

from suing the Union for damages or other appropriate relief arising from the alleged commission of property damage.